Public Government for Private People

The Report of the Commission on Freedom of Information and Individual Privacy/1980

VOLUME 1

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5 August, 1980

The Honourable Alan W. Pope,
Minister Without Portfolio

Dear Mr. Minister:

We, the Commissioners on Freedom of Information and Individual Privacy, appointed in March, 1977, have completed the substantial tasks then assigned us. We have invited briefs and held public hearings to enable all who wished to make their views known.

We have also commissioned a series of studies by eminent scholars and other experts on the issues arising out of our mandate. The briefs and papers thus secured constitute the stuff out of which our report is fashioned; the argument and recommendations of which we respectfully submit herewith.

D. C. Williams
Chairman

G. H. U. Bayly
Commissioner

D. J. Burgoyne
Commissioner

The Commission on Freedom of Information and Individual Privacy

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Order in Council

Copy of an Order in Council approved by Her Honour the Lieutenant Governor, dated the 30th day of March, A.D. 1977.

The Committee of Council have had under consideration the report of the Honourable the Premier and President of the Council, wherein he states that,

WHEREAS the Government wishes to improve public information policies and relevant legislation and procedures of the Government of Ontario, while protecting the rights of individuals to personal privacy;

The Honourable the Premier and President of the Council therefore recommends that a committee to be known as the Committee on Freedom of Information and Individual Privacy be established to study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of Government information;

3. The categories of Government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of Government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of Government records.

The Honourable the Premier and President of the Council further recommends that the following persons be appointed members of the Committee:

Dr. D. Carlton Williams, London
Mrs. Dorothy J. Burgoyne, St. Catharines
Mr. G.H.U. Bayly, Toronto

and that Dr. D. Carlton Williams be designated Chairman of the Committee.

And the Honourable the Premier and President of the Council further recommends that the Committee make use, where appropriate, of the services and facilities of any Ministry, board, commission or agency of the Government of Ontario, and that the Committee receive briefs and submissions and provide full opportunity for interested organizations and individuals to discuss their views with the Committee.

And the Honourable the Premier and President of the Council further recommends that the Committee be authorized to engage such staff and advisors as it deems proper at rates of remuneration and reimbursement to be approved by the Management Board of Cabinet.

The Committee of Council concur in the recommendations of the Honourable the Premier and President of the Council and advise that the same be acted on.

Certified,

(Signed) D.Y. Lewis
Acting Clerk, Executive Council

Order in Council

Copy of an Order in Council approved by Her Honour the Lieutenant Governor, dated the 29th day of April, A.D. 1980.

Upon the recommendation of the Honourable the Attorney General, the Committee of Council advise that the Order-in-Council numbered OC-920/77 dated the 30th day of March, 1977, be amended by deleting from the 4th and 5th lines of the third paragraph the words:

> "be established to study and report
> to the Attorney General of Ontario"

and substituting in lieu thereof the words:

> "be established to study and report
> to the Honourable Alan Pope on behalf
> of the Government of Ontario."

Certified,

(Signed) J.E. Tangney
Deputy Clerk, Executive Council

"The modern totalitarian state relies on secrecy for the regime, but high surveillance and disclosure for all other groups."

"The democratic society relies on publicity as a control over government, and on privacy as a shield for group and individual life."

- Alan F. Westin, Privacy and Freedom

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Preface

Of the many countries in the Western world where freedom of information and privacy protection statutes already exist, the best known are Sweden (where the tradition is some 200 years old) and the United States (which substantially revised its laws on the subject as recently as 1976). Even more recent are the provincial freedom of information laws of New Brunswick and Nova Scotia. The governments of Canada, Australia and the United Kingdom are in various stages of contemplating or enacting such legislation.

Ontario is the only province in Canada to have approached the problem by establishing a Commission to examine and report on the matter. Our Commission is unique in that, to the best of our knowledge, we are the first to have been asked to consider freedom of information and individual privacy simultaneously.

Historically, democratic governments modelled on the English tradition (Westminster-style governments) have been slow to adopt freedom of information and privacy legislation.

Our report concerns itself at length with seeking an explanation not only for this reluctance, but also for the recent movement toward greater rights of access to government-held information. The English tradition of government secrecy, based on public trust and confidence, has been seriously eroded by the many betrayals of that confidence that have recently come to light, the most notorious of which was the Watergate scandal. Of equal, if less dramatic, importance has been the recent use by governments of computers as storehouses of information, both general and personal, which seem to be highly vulnerable to access by unauthorized persons.

The result is that people now want to see for themselves what governments are up to, and they want to be sure, as well, that the private information governments hold is not only accurate, but properly protected from prying eyes.

Clearly, freedom of information -- the public right to know -- and the protection of personal privacy -- the right of the citizen to be let alone -- are both highly valued in our society, and therefore come into conflict with each other. This conflict was dramatically symbolized for this Commission in the first two briefs presented to us. The first, from a distinguished professor of medicine specializing in cancer research, argued that he and his colleagues must have complete freedom of information on all aspects of the lives of cancer patients available to them if this scourge is to be defeated. The second, by the Executive Director

of the Ontario Medical Association argued that unless the doctor-patient relationship and the confidences it elicits were vigorously protected, the whole OHIP reporting system would dry up. Few would take issue with either proposition; yet a resolution of such conflicts must be found.

We have been challenged by the comment, "I have nothing to hide. The government can have every shred of information there is about me for all I care. Why all the fuss about it?"

Aside from the smugness this conveys, the question naively assumes (a) that all the information the government holds about each of us is true, and (b) that none of it will fall into the wrong hands. How can we know what has been said about us by mischief-making or envious neighbours? How can we know who has had illegal access to information we would not hesitate to share with a trustworthy official or with a friend, but which one would be most reluctant to disclose to others?

The Commission has relied on two sources of information. The first is the briefs submitted, along with our extensive and widespread hearings. The second is the research papers prepared by scholars and experts dealing with the principal problems we faced, coupled with diligent research done by our own staff.

The publication of the research papers has materially reduced the size of the final report. Even so, it is still a bulky document. Two considerations have led us to produce a report of such length. First, both freedom of information and privacy protection are subjects which inspire consensus on matters of general principle but division on questions of detail. Accordingly, we have felt it necessary to consider in great detail how freedom of information and privacy protection issues should best be addressed. Second, it is our view that a report such as this, which recommends substantial reform of government information policy, should be accompanied by a description of existing information policies and laws and should offer a full explanation of the reasoning underlying our recommendations. The reader will find, therefore, that the report contains discussion and analysis of a number of alternative approaches to the issues and an explanation of the Commission's basis for selecting a particular one.

It should be emphasized that our terms of reference refer only to government-held information and preclude consideration of information practices of the private sector of the economy, a limitation that has narrowed the bounds of this report, even as it invites the establishment of another commission on the private sector.

Summary of Recommendations

INTRODUCTION

The Commission has recommended the enactment of a freedom of information law to establish a public right of access to government-held information and a privacy protection law to regulate the collection, storage, use and dissemination of personal information held by governmental institutions in Ontario.

Our report is divided into three volumes. This volume contains an outline of the main features of our proposed legislation, a summary of the proposed administration procedure and a consolidation of our recommendations. Discussion and explanation of our specific recommendations for the freedom of information law appear in Volume 2 (Chapters 1 to 24). The issue of individual privacy and our recommendations with respect to a privacy protection law for Ontario are discussed in detail in Volume 3 (Chapters 25 to 39).

FREEDOM OF INFORMATION

The essential features of our proposed freedom of information law are:

1. a general public right of access to government-held information;

2. a list of specific exemptions from this general right to protect the legitimate needs of government for confidentiality;

3. independent review of government decisions to release or withhold information.

THE PUBLIC RIGHT OF ACCESS

Under our proposals, any person would be entitled to see and obtain a copy of a government document in the possession of provincial or local government institutions in Ontario. At the provincial level the law would apply to all public bodies financed through the Consolidated Revenue Fund (including all ministries, boards and commissions) or otherwise owned or controlled by the government of Ontario.

To help members of the public to locate information, our proposals require the government to publish or otherwise make available a general directory of government-held information. In addition, governmental institutions would be required to make available for inspection and copying their internal rules, policies and guidelines used in the administration of programs that affect members of the public.

THE EXEMPTIONS

All the briefs we received in the course of our public hearings agreed that there must be exemptions in a freedom of information law to protect the legitimate needs of government for confidentiality, although there were differences of opinion as to what these should be. In making our recommendations with respect to exemptions, we have tried to find a proper balance between the public right to information about the operations of government and the need to protect, in the public interest, the confidentiality of certain information. In general terms, we have proposed exemptions for the following matters:

- Cabinet documents;
- advice and recommendations;
- law enforcement;
- national defence and international relations;
- information received in confidence from another government;
- confidentiality preserved by other statutes;
- commercial information;
- disclosures creating unfair advantage or causing harm to negotiations or testing procedures;
- personal privacy;
- legal opinions.

We have also recommended that if a request is made for access to documents which may be exempt from the general rule of public access because they contain personal or commercial information,

the person to whom the information relates be given an opportunity to participate in the decision to release or withhold the documents.

INDEPENDENT REVIEW

While again there was unanimous agreement in the briefs we received from the public that independent review of government decisions to release or withhold information was essential to the success of a freedom of information law, again there were differences with respect to the form this review should take. Some preferred the court system; others argued in favour of an independent administrative body. We have recommended the establishment of a two-stage process of independent review. A Director of Fair Information Practices would be appointed to attempt to conciliate disputes arising between the government and a member of the public requesting information. The Director would have the power to decide whether or not the information should be released. His decision could be appealed to our proposed Tribunal of Fair Information Practices either by the governmental institution or by the applicant. This tribunal would also be empowered to order or refuse the release of information. Its decisions would be subject to judicial review under The Judicial Review Procedure Act.

We have also recommended that the current practice of requiring Ontario's public servants to take an oath of secrecy under The Public Service Act be discontinued and that a committee of the Legislative Assembly undertake a review of the other secrecy provisions which appear in over 100 Ontario statutes with a view to their amendment or repeal.

THE PROTECTION OF INDIVIDUAL PRIVACY

We have recommended the adoption of a comprehensive data protection law to ensure that individual privacy is protected in the collection, use, transfer and storage of personal information by provincial and local governmental institutions in Ontario.

Our proposed data protection law is designed to fulfill the following objectives:

1. To encourage restraint and fairness in the collection of personal data by government;

2. To ensure that the public is aware of the existence and nature of government information systems containing personal data;

3. To give individuals the right to examine and correct records containing personal information about them, subject to certain exceptions;

4. To allow individuals to participate in decisions about the use and dissemination of personal information about them;

5. To establish data management standards to protect the integrity and security of personal information held in government records.

RESTRAINT AND FAIRNESS IN DATA COLLECTION

Under our proposals, governmental institutions would be required to consider the privacy protection implications before the collection of information begins and they would be permitted only to collect such data as is authorized by law or is relevant and necessary to the legitimate purposes of a government program. Individuals would have to be informed at the time of collection why the information is needed and what uses will be made of it. In addition, whenever practicable, governmental institutions would be under a duty to collect data directly from the individual concerned.

PUBLIC KNOWLEDGE OF GOVERNMENT DATA SYSTEMS

Our proposals would require governmental institutions to publish annual "systems notices" for each data bank containing personal information that they maintain. These notices would indicate the nature of the information recorded in the data system, the legal authorization for its establishment, the categories of individuals about whom the records are kept and the principal uses made of the data.

ACCESS BY INDIVIDUALS TO THEIR RECORDS

We have recommended that, as a general rule, individuals in Ontario should be given the right to examine government records that contain personal information about them and to seek corrections in their files if they are found to contain erroneous information. Disputes between individuals and governmental institutions in this context would be subject to the same review mechanisms as those under the freedom of information law -- the Director and the Tribunal of Fair Information Practices.

Exceptions to the general rule of subject access are recommended for records containing certain kinds of medical information, correctional records and information obtained in confidence from third parties. In addition, we have recommended that some of the exemptions from the general rule of public access under the freedom of information law be incorporated into the subject access scheme to avoid disclosure, for example, of Cabinet documents or information relating to law enforcement.

INDIVIDUAL CONTROL OVER THE USE OF PERSONAL INFORMATION

To enable the individual concerned to participate in decisions about the use of personal information, we have recommended that governmental institutions be required to obtain his consent before data supplied to them for one purpose may be used for another. In certain defined circumstances, under our proposals, disclosures or transfers of personal data may be made by governmental institutions without first seeking the consent of the individual concerned, but the institution must keep a record of these uses and make it available to the data subject on request. In this way, individuals will be able to monitor the dissemination of information about themselves to ensure that the statutory limits on disclosure are adhered to by the government.

DATA MANAGEMENT STANDARDS

Our proposed legislation imposes duties on governmental institutions to observe data management standards to protect the integrity and security of records containing personal information. When this kind of information is collected about an individual for the purpose of making a decision affecting his rights or obligations, it is essential that it be accurate, relevant, complete and up-to-date. Our proposed data management standards are designed to ensure this and to ensure that governmental institutions that collect personal information establish appropriate administrative, technical and physical safeguards to protect it.

THE DATA PROTECTION AUTHORITY

As we said earlier, disputes between individuals and governmental institutions arising under the data protection law would be handled by the Director and the Tribunal of Fair Information Practices. We have recommended that a Data Protection Authority be established to oversee the implementation of our proposed data protection law and to develop detailed data management standards to give effect to the general requirements of the legislation.

In addition, the Data Protection Authority should play a research and advisory role with respect to privacy protection issues which arise in both government and private sector data collection activities.

LOCAL GOVERNMENT IN ONTARIO

We have recommended that our proposed freedom of information and data protection laws apply to local as well as provincial government institutions. An additional matter concerning local government bodies was drawn to our attention by many of the public briefs we received and by a research study prepared for us on access to information and local government[1]. It is apparently the practice of some local government bodies in Ontario, including some municipal councils for example, to hold major portions of their meetings in sessions from which the public are excluded. We have recommended the adoption of legislation containing "sunshine" provisions, which would require local government bodies to conduct their deliberations in public session, except in specified circumstances. These proposals are discussed in Volume 2, Chapter 24.

1 Stanley M. Makuch and John Jackson, Freedom of Information and Local Government in Ontario (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 7, 1979).

Summary of Administration Procedure

The legislation to provide for freedom of information and protection of privacy should apply to documentary information, however recorded.

The procedure for the administration of the proposed legislation should provide a simple and inexpensive means for resolving disputes where they arise concerning the release of documents held by the government relating to public affairs and personal privacy.

Requests for government-held information may be made and complied with as they are now, without invoking provisions of the proposed legislation.

For the administration of the legislation, officers should be appointed in all ministries and government institutions with a duty to consider formal applications as they arise. In some cases one or more persons should be charged with this duty for a particular department or institution. In case the duty would not warrant the appointment of a full-time employee it may be performed by a designated employee on a part-time basis.

In the first instance the request for information should be made directly to the proper information officer or be referred to him by anyone in the government service who may have reason to doubt his right to comply with the request. The information officer should have power to decide whether the information requested should or should not be released.

Either the government or the applicant should have a right to require that the decision of the information officer be reviewed by the Director of Fair Information Practices. The Director should be charged with the duty of considering the matter informally in consultation with the applicant and the responsible officers of the government. He should endeavour to resolve the matter as expeditiously and with as much informality as possible. At this stage the discharge of his duties should be conciliatory in nature.

If it is not possible to arrive at a satisfactory resolution of the matter, the Director should be empowered to make a decision as to whether the information requested should or should not be released.

The government or the applicant should have the right to appeal from the decision of the Director to the Fair Information Practices Tribunal, an independent tribunal which would have the power to order or refuse the release of the information in whole

or in part. The provisions of The Statutory Powers Procedure Act should apply to all proceedings before the independent tribunal, save that the tribunal should have the power to examine the documents in question and to receive submissions from the government in the absence of the applicant.

Either party should have the right to apply for judicial review of the decision of the tribunal under the provisions of The Judicial Review Procedure Act.

The Director and the members of the Tribunal should be appointed by Order in Council for a term of years subject to dismissal for cause. They should report annually to the Premier. The reports should be tabled at the next session of the Legislature or published at an earlier date.

The collection, control and storage of personal information as it relates to the privacy of the individual is of urgent importance with the development of technological means for recording and communicating information. A special administrative body, to be known as the Data Protection Authority, should be established for the purpose of applying and enforcing all statutory provisions concerning the collection, use, storage, and transfer of personal information held in government records.

Rules and regulations concerning procedure under the legislation should be made by the Lieutenant Governor in Council and published under the provisions of The Regulations Act. They would be subject to review by the Standing Committee of the Legislature on Statutory Instruments.

Consolidation of Recommendations

FREEDOM OF INFORMATION

CHAPTER 10: THE PROPOSED LEGISLATION: A GENERAL VIEW

1. It is our recommendation that freedom of information legislation should embody three essential features:

   a. a general right of any person to obtain access to government documents;

   b. a list of exempting provisions designed to protect the needs of governmental institutions for confidentiality;

   c. an independent and authoritative mechanism for reviewing appeals relating to freedom of information requests.

CHAPTER 11: A GENERAL RIGHT OF ACCESS TO PUBLIC DOCUMENTS

2. The duty to provide access to information to the public should be imposed on all institutions of government and, in particular, should apply to all departments, boards, commissions, corporations or other public bodies that are either:

   a. financed exclusively from the consolidated revenue fund of the province of Ontario, or

   b. controlled by the government either through ownership of fifty per cent or more of the issued and outstanding shares in a corporate body or through having the power of appointment of a majority of the board of directors or other governing body or committee of the institution in question.

3. The freedom of information scheme should not apply to the proceedings of the Legislative Assembly nor to the judicial functions of the courts but their administrative and support services should be brought within the scope of the act.

4. Documents that have been transferred to the Archives of Ontario should be subject to the public right of access set forth in our proposals.

5. The freedom of information scheme should also apply to the institutions of local and municipal government.

6. The right of access should extend to information contained in existing records. The notion of existing records of "documents" should be broadly defined to include modern forms of information storage and retrieval. The term "document" should be defined to include "any record of information, however recorded, whether in printed form, on film, by electronic means or otherwise."

7. The right of access should not be restricted to documents which come into existence after the implementation of the freedom of information scheme.

8. It is not necessary to set forth a specific statutory rule to deal with situations in which the information has been made available to the public in a published volume.

9. As a general rule, the individual should be entitled to obtain a copy of any document to which the right of access extends, except in situations where either:

   a. it would not be reasonably practicable to reproduce the record or part thereof by reason of the length or nature of the record; or

   b. the making of such copy would involve an infringement of copyright other than copyright of Her Majesty in right of Ontario.

10. Appropriate forms of access should be established for materials such as films, sound recordings, and computerized information systems. The proposals of the federal Australian Freedom of Information Bill 1978 provide a useful model with respect to these questions.

11. The government should be required to produce a copy of the original document with no burden of translation.

12. Where a request is made for access to a document that contains, in part, information exempt from the general right of access, the governmental institution involved should make reasonable efforts to sever non-exempt material from the document.

CHAPTER 12: OBLIGATIONS ON GOVERNMENT

13. There should be a general directory of information to assist the citizen to locate the government-held information he requires.

14. A period of experimentation in developing materials providing useful descriptions of government information holdings to assist interested individuals in formulating requests for information under the freedom of information law should be undertaken.

15. The "internal law" of governmental institutions should be made available to the public for inspection and copying, and notices indicating its general nature and the locations at which it can be inspected should be published in the Ontario Gazette. The kinds of materials to which this requirement should apply are usefully defined in the Australian Freedom of Information Bill in the following terms:

> ...documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments to or for which persons are or may be entitled or subject, being --
>
> a. manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or
>
> b. documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,
>
> but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

16. Apart from precedents which must be made available for inspection and copying in accord with the above recommendations, and the decisions and reasons therefor of governmental institutions made in adjudication of cases, indexes to these materials should also be prepared and made available to the public. Neither the decisions nor the indexes of this material need be published in the Ontario Gazette.

17. Where compliance with the above requirements would involve the disclosure of information that would otherwise be exempt from the general rule of public access (as, for example, in the case of "precedents" arising in the context of decision making with respect to social assistance applications which might contain sensitive personal information) the

governmental institution should, where practicable, make public a version of the material from which such items have been deleted.

18. Rules or policies contained in materials of the kind described in paragraph 15 above should not be permitted to affect adversely an individual if the governmental institution in question has failed to comply with these publicity requirements, unless the individual has had actual notice of the rule or policy in question.

CHAPTER 13: PROCEDURAL MATTERS

19. A request for information made in the exercise of rights conferred by the freedom of information legislation should be made in writing.

20. To be effective, the request should provide sufficient information about the document to enable an employee of the department who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.

21. If a request does not reasonably describe the record sought, the governmental institution in question should inform the applicant of the defect and offer assistance in reformulating the request so as to comply with the legal requirement of specificity.

22. Where a request for a document is received by a governmental institution which does not possess it, the institution should either:

    a. notify the requester of the correct location of the document, or

    b. transfer the request to the appropriate institution and notify the requester that this action has been taken.

23. The statute should not provide that a request, in order to be effective, must be directed to a particular public official. It should be possible to forward requests either to the institution or to any of the employees of the institution.

24. Governmental institutions to which requests have been forwarded should be required to make a decision with respect to the request within thirty calendar days. Failure to respond within this period should be deemed to be a refusal to grant

access, which would enable the requester to pursue appeal remedies under the statute.

25. An extension of the period during which a response is required for an additional thirty days should be permissible

    a. to obtain a document from an office of that agency which is in a location different from that of the office processing the request;

    b. to search for or appropriately examine a large number of documents included within the request; or

    c. to consult with

        i. another office of that agency which is in a location different from the office processing the request;

        ii. another agency; or

        iii. a person having a substantial interest in the document requested.

26. The time periods stipulated in paragraphs 24 and 25 should be reconsidered and reduced once experience in implementing the statutory scheme has been acquired.

27. A governmental institution that proposes to deny a request for access to a document should advise the requester of the following matters:

    a. the statutory provision under which access is refused;

    b. an explanation of the basis for the conclusion that the information sought is covered by the exempting provision;

    c. the availability of further review and how it can be pursued; and

    d. the name and office of the person responsible for making the decision.

28. Governmental institutions should be permitted to require requesters to bear reasonable standard charges for the direct costs of searching for and copying requested documents. In the case of information stored in computerized information systems, requesters may be required to pay hourly charges for

the time of the personnel involved in providing the computer printout as well as any additional direct costs to the institution resulting from the use of the computer system.

29. Governmental institutions should be required to waive fees with respect to the provision of information the disclosure of which can be considered as primarily benefiting the public. Criteria for the exercise of discretion to waive fees should include the following:

    a. the size of the public to be benefited;

    b. the significance of the benefit;

    c. the private interest of the requester which the disclosure may further;

    d. the usefulness of the material to be released;

    e. the likelihood that a tangible public good will be realized.

30. As a general rule, requesters should not be required to pay search fees in cases where it is ultimately learned that there are no records corresponding to the request, or where records are found but are determined to be exempt from disclosure by the institution in question, unless the requester has been given prior notice that fees are chargeable even though a request may be unsuccessful.

31. A governmental institution should be permitted to require a deposit from the requester to ensure payment of search and copying fees if the anticipated cost will exceed a prescribed amount, such as $50.00.

32. If, in the course of searching for a document, it becomes apparent that the requester may be assessable for substantial fees, the governmental institution should advise the requester before proceeding further so as to ensure that the cost will be acceptable to him.

33. All matters relating to fees should be subject to review by the Director of Fair Information Practices.

34. Governmental institutions should provide, on request, a written statement indicating the method by which fees have been assessed.

Cabinet Documents

35. We recommend that the freedom of information law contain an exemption for documents whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:

    a. agendas, minutes or other records of the deliberations or decisions of Cabinet or its committees;

    b. records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet minister to Cabinet;

    c. records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Cabinet minister to Cabinet for consideration by Cabinet in making decisions, before such decisions are made;

    d. records used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

    e. records containing briefings to Cabinet ministers in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

    f. draft legislation.

Advice and Recommendations

36. We recommend that the freedom of information law include an exemption for documents containing advice or recommendations of public servants and consultants retained by a governmental institution, provided that the exemption should not be construed to include documents of the following kinds:

    a. an explanation or interpretation of a decision previously made by a governmental institution;

b. a document that has been expressly referred to by the institution as containing the reasons for or justification of a decision made by the institution;

c. "internal law," as defined in our proposals in Chapter 12.

Law Enforcement

37. We recommend that the freedom of information law provide that in replying to a request for a document or documents or their contents which fall into any of the categories hereinafter set out in this paragraph, the government be empowered to reply that the request falls within such categories, and the government refuses to disclose even the existence or non-existence of such document or documents. The categories herein referred to are documents which could reasonably be expected to:

a. interfere with an enforcement proceeding;

b. interfere with an investigation undertaken with a view to an enforcement proceeding or from which an enforcement proceeding might be reasonably expected to eventuate;

c. interfere with the gathering of intelligence information on organizations or individuals;

d. reveal investigative techniques and procedures currently in use or likely to be used;

e. disclose the identity of a confidential source of information or disclose information furnished only by that confidential source;

f. endanger the life or physical safety of persons engaged in law enforcement activity;

g. deprive a person of a fair trial or impartial adjudication;

h. endanger the security of a building, or the security of a vehicle carrying items, or of a system or procedure for the protection of items, for which protection is reasonably required;

i. facilitate the escape from custody of a person who is under lawful detention or who could otherwise be expected to jeopardize the security of a centre for lawful detention; or

j. otherwise be helpful in the commission of criminal or regulatory offences, or tend to restrict the detection of crime.

38. The preceding recommendation should not be construed to include:

a. a report on the degree of success achieved in a law enforcement program or programs, including statistical analysis;

b. a report prepared in the course of routine inspections or investigations by an agency that has the function of enforcing and regulating compliance with a particular law of Ontario.

39. We further recommend that the freedom of information law provide that a refusal by a governmental institution to confirm or deny the existence of a document which falls into the exemption in paragraph 37 above be subject to review by the Director of Fair Information Practices.

International Relations and National Defence

40. We recommend that the freedom of information law include exemptions for documents the disclosure of which would tend to prejudice:

a. the international relations of the government of Canada or the relations of the province of Ontario with other governments;

b. the defence of Canada.

Information Received in Confidence from Other Governments

41. We recommend that the freedom of information law contain a provision exempting documents whose disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another jurisdiction to the government of the province of Ontario or a person receiving a communication on behalf of the government of Ontario.

Confidentiality Preserved by Other Statutes

42. We recommend the adoption of an exemption in the following terms:

> Government institutions are not required to disclose information specifically exempted from disclosure by statute, provided that such statute (a) requires that the matter be withheld from the public in such a manner as to leave no discretion in the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

43. It should be expressly provided that the implementation of this recommendation should not affect the power of the courts or any other body exercising powers conferred on it to compel witnesses to testify or produce documents.

44. Review of statutory secrecy provisions in other statutes in existence at the time of the enactment of the freedom of information law should be undertaken by a committee of the Legislative Assembly with a view to either:

a. repealing unnecessary provisions, or

b. amending provisions so as to conform with the general principles of the proposed freedom of information legislation.

45. Statutory secrecy provisions which have neither been revised nor reaffirmed by the Legislative Assembly pursuant to the process envisaged in paragraph 44 should be deemed to expire two years after the enactment of the freedom of information law.

Commercial Information

46. We recommend the adoption of the following exemptions relating to commercial information:

a. A governmental institution may refuse to disclose a record:

i. containing a trade secret or other financial, commercial, scientific or technical information obtained from a person, if the disclosure of that information could reasonably be expected to prejudice significantly the competitive position, or

interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization, or

ii. the disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the governmental institution, where the information was supplied to the institution on the basis that the information be kept confidential, and where it is in the public interest that information of that type continue to be supplied to the institution.

b. A governmental institution shall not refuse to disclose a record under the exemption proposed in paragraph 46(a) where a compelling public interest in favour of disclosure outweighs the risk of commercial disadvantage to the submitter of the information, such as the public interest in environmental protection, public health and safety, and consumer protection.

c. A governmental institution engaged in trade and commerce may refuse to disclose a document in accord with the exemption set forth in paragraphs 46(a) and (b).

d. A governmental institution shall refuse to disclose a document containing a trade secret of the institution or the results of research undertaken by the institution where the institution intends to sell the results of the research.

Information Creating Unfair Advantage or Harm to Negotiations

47. We recommend the adoption of the following exemptions in the proposed freedom of information law. A governmental institution may refuse to disclose:

a. documents whose disclosure would prematurely reveal the intentions of the governmental institution to introduce a policy, proceed with a project, or implement a decision made with respect to such matters where premature disclosure of such information could reasonably be expected to result in undue loss or gain to any person;

b. a document whose disclosure would reveal a proposed economic transaction of the institution, where disclosure could reasonably be expected to adversely affect

the institution's ability to protect its legitimate economic interests;

c. a document containing instructions to public officials on procedures to be followed and criteria to be applied in negotiations, including financial, commercial, labour and inter-governmental negotiations, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities, where disclosure would unduly impede the proper functioning of the institution to the detriment of the public interest;

d. a document containing information relating to testing or auditing procedures, techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits.

Personal Privacy

48. An exemption to the general principle of access should be made to protect personal privacy. The exemption should contain these features:

a. a list of situations in which there is an overriding interest in disclosure;

b. a balancing test permitting disclosure not amounting to an "unwarranted invasion of privacy" and indicating a range of factors to be taken into account in applying this test;

c. a definition of sensitive personal information which is to be subject to a presumption of confidentiality.

49. With respect to item 48(a), the following is proposed:

No individually identifiable record shall be disclosed by any means of communication to any person other than the individual to whom the record pertains unless the disclosure is:

a. pursuant to a written request by, or with the prior written consent of, the individual to whom the record refers (provided that the record is one which the individual himself is entitled to see);

b. pursuant to a showing of compelling circumstances affecting the health or safety of any individual, if upon

disclosure notification thereof is transmitted to the last known address of the individual to whom the record pertains;

c. of information collected and maintained specifically for the purpose of creating a record available to the general public;

d. pursuant to a statute of Ontario or Canada that expressly authorizes the disclosure;

e. for a research purpose if

i. the use of disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected or obtained;

ii. the research purpose for which the disclosure is to be made:

A. cannot be reasonably accomplished unless the information is provided in individually identifiable form; and

B. warrants the risk to the individual which additional exposure of the information might bring;

iii. the qualifications of those who will conduct the research warrant the conclusion that the research objectives will be satisfactorily achieved;

iv. the research proposal is soundly designed in terms of its ability to achieve the stated research objectives, its cost-effectiveness, and its reduction, to the extent practicable, of the inconvenience of those public servants or agencies who are the custodians of the data in question; and

v. terms and conditions relating to:

A. the security and confidentiality of the data;

B. the destruction of the individual identifier or identifiers associated with the record at the earliest time at which removal or destruction can be accomplished consistent with the

purpose of the research or statistical project;

C. the prohibition of any subsequent use or disclosure of the record in individually identifiable form without the express authorization of the department or agency from which the data is to be obtained,

have been approved by the Ontario Data Protection Authority and the recipient has filed with the DPA a written statement attesting to his understanding of, and willingness to abide by, such terms and conditions;

f. determined not to constitute an unwarranted invasion of personal privacy.

50. With respect to item 48(b) the following is proposed:

In determining whether a particular invasion of privacy is, in the circumstances, warranted, the following factors, among others, may be considered:

a. whether the information is necessary for the purpose of subjecting the activities of the province and its agencies to public scrutiny;

b. whether access to the information sought may promote public health and safety;

c. whether access to the information sought will promote informed choice in the purchase of goods and services;

d. whether the requested information is relevant to a fair determination of rights affecting the requester;

e. whether the record subject will be exposed unfairly to substantial harm, pecuniary or otherwise;

f. whether the information is of a highly sensitive personal nature;

g. whether the information is unlikely to be accurate or reliable;

h. whether the information has been supplied by the data subject in confidence.

51. With respect to item 48(c), the following is proposed:

In the absence of a substantial interest in public access, disclosure will be presumed to constitute a clearly unwarranted invasion of personal privacy in personal records:

a. relating to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, other than information confirming an individual's presence in a health care facility;

b. compiled and identifiable as part of an investigation into a possible violation of criminal law except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

c. relating to eligibility for social service or welfare benefits or to the determination of benefit levels;

d. relating to employment history, other than an individual's acts as a government employee or officer and the fact of government employment, including the position held and the level of compensation;

e. obtained on an income or similar tax return or gathered by an agency for the purpose of administering an income or similar tax;

f. describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

g. which are personal recommendations or evaluations, character references or personnel evaluations;

h. indicating racial or ethnic origin or religious or political beliefs and associations; or

i. required to be kept confidential by law.

Solicitor-Client Privilege

52. We recommend the adoption of an exemption based on the doctrine of solicitor-client privilege in the following terms:

a. A document is an exempt document if it is of such a nature that it would be privileged from production in pending or likely legal proceedings to which a

provincial governmental institution is or may be a party, on the ground of legal professional privilege.

b. A document of the kind referred to in item 52(a) is not an exempt document if it is used by governmental institutions as a source of "internal law," that is to say, as a source of guidance or policy for the making of decisions concerning individuals.

CHAPTER 15: THE REVIEW PROCESS

53. A public official, the Director of Fair Information Practices, and a tribunal, the Fair Information Practices Tribunal, should be established for the purpose of performing certain functions, further explained below, with respect to the resolution of disputes between governmental institutions and individuals seeking access to government documents.

54. An individual who has made a request and feels aggrieved by any decision made with respect to the request by the governmental institution in question may seek a review of the decision by the Director of Fair Information Practices.

55. The director should be empowered to investigate the circumstances of the dispute, seek a reconciliation of the differences between the parties, and in the event that the dispute cannot be satisfactorily resolved, make an appropriate order with respect to the matter after giving both parties an opportunity to make representations. Proceedings before the director should not be subject to The Statutory Powers Procedure Act.

56. Either party may seek a further review of the matter in dispute on appeal to the Fair Information Practices Tribunal. The tribunal should conduct a hearing substantially in accord with the provisions of The Statutory Powers Procedure Act and make any appropriate order.

57. Either party to a proceeding before the Fair Information Practices Tribunal should be entitled to seek judicial review pursuant to the provisions of The Judicial Review Procedure Act.

58. The Director of Fair Information Practices and the Fair Information Practices Tribunal should have the power to review disputed documents in camera. The tribunal should be empowered to entertain representations from the governmental institution in the absence of the applicant where this is

necessary to facilitate a full explanation of the reasons for non-disclosure of the document.

59. The Director of Fair Information Practices and the members of the Fair Information Practices Tribunal should be appointed by the Lieutenant Governor in Council with security of tenure for a period of years, provided that either the director or any member of the tribunal may be dismissed for cause.

60. In proceedings with respect to decisions taken by governmental institutions in response to requests for documents, the institution to which the request was made should have the onus of establishing that the decision was justified.

CHAPTER 16: PROTECTING THE RIGHTS OF SUBMITTERS OF INFORMATION AND DATA SUBJECTS

61. In any case where a governmental institution is of the view that a proposed disclosure may have a substantial impact on the interests of a submitter or data subject, the institution should so notify the submitter or data subject and entertain representations relating to the proposed disclosure.

62. In a case where a governmental institution has decided to deny a request for a document containing information pertaining to either a submitter or a data subject, and an appeal from this decision has been made by the requester, the institution should be permitted to so notify the submitter or data subject.

63. Regardless of whether notices of the kind suggested above have been served by a governmental institution on a submitter or data subject, such parties should be entitled to make representations to the institution with respect to proposed disclosures of which they have become aware. Further, submitters or data subjects should be entitled to participate in proceedings in the nature of review or appeal.

64. Where the document in question contains information that may be exempt under the commercial information exemption, submitters should be entitled to obtain an independent review of a decision to disclose by the Director of Fair Information Practices and the Fair Information Practices Tribunal. On review, the director or the tribunal should be entitled to substitute his or its discretion for that of the institution in deciding that the document should be disclosed. Inasmuch as the commercial information exemption is to remain "permissive," however, the decision to disclose will remain

discretionary in character. Accordingly, further review on the merits, beyond the level of the tribunal, would not be available to parties protesting the disclosure of commercial information.

65. Where the document in question contains personal information, data subjects should be entitled to obtain an independent review of a decision to disclose by the Director of Fair Information Practices of the Fair Information Practices Tribunal. As the privacy exemption is "mandatory," the director or the tribunal will, if they are of the opinion that the document is exempt, order that it not be disclosed. Further review of a decision to disclose would be possible to the extent that the tribunal has erred in law or otherwise created grounds for review under The Judicial Review Procedure Act.

CHAPTER 17: ADMINISTRATION OF THE ACT

66. Extensive educational programs for members of the public service should be undertaken with respect to the freedom of information scheme and its application to the information holdings of each governmental institution subject to its provisions. The Director of Fair Information Practices should be involved in the design and implementation of these programs.

67. Each governmental institution subject to the legislation should assign responsibility for the making of decisions to deny access to a particular official (to be called perhaps the Information Policy Officer) and should give consideration to establishing mechanisms for internal review of decisions that deny requests for access to information.

68. The Director and the Tribunal of Fair Information Practices should report annually to the Premier and their reports should be tabled in the legislature. The director's report should contain the following information:

    a. an indication of the nature and ultimate resolution of complaints brought to him by individuals protesting decisions taken under the act by governmental institutions;

    b. an assessment of the extent to which governmental institutions are successfully complying with the leglislation;

c. any recommendations the director may wish to make with respect to the practice of particular institutions or proposed revisions to the legislation.

CHAPTER 18: CIVIL AND CRIMINAL LIABILITY

69. The existing statutory provisions creating offences for disclosure of confidential information by public servants should be reviewed by a committee of the Legislative Assembly with a view to their modification or repeal in appropriate cases.

70. The freedom of information law should not attach penal consequences to the failure of a public servant to comply with the provisions of the act, nor should it include mechanisms for launching disciplinary proceedings in addition to those already in place in the province of Ontario.

CHAPTER 19: INTEGRATING FREEDOM OF INFORMATION WITH THE DOCTRINE OF CROWN PRIVILEGE

71. The doctrine of Crown privilege should not constitute a further exception to the general principle of access.

72. The doctrine of Crown privilege should continue to operate as the basis for determining requests for government information by litigants inasmuch as it may allow litigants access to more documents than are available to ordinary requesters under the freedom of information scheme. Further, the freedom of information legislation should clearly stipulate that it is not to be construed as restricting in any way the information available to litigants under the Crown privilege rules.

73. In addition to relying on the degree of disclosure secured by Crown privilege rules, litigants should be able to apply for access to government documents under the freedom of information scheme.

74. The freedom of information law should expressly provide that provisions of this act shall not affect the courts or any other body in the exercise of their inherent or statutory powers to compel witnesses to testify or produce documents.

CHAPTER 20: INTEGRATING FREEDOM OF INFORMATION WITH DUE PROCESS SAFEGUARDS

75. The fact that a person is involved in administrative decision-making proceedings should not operate as a bar to the exercise of rights of access under the freedom of information law.

76. Consideration should be given to the need for clarifying the extent to which existing mechanisms for judicial review of administrative decision making would include the power to order a stay of administrative proceedings pending the outcome of a request for information under a freedom of information statute.

CHAPTER 21: OATHS OF SECRECY

77. The practice of requiring public servants to subscribe to the broad oath of secrecy in section 10 of The Public Service Act should be discontinued.

78. A suitable alternative to the existing secrecy oath would be an oath of faithful service, as contained in the following terms in the opening passage of section 10 of The Public Service Act:

> I, ..., do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario.

79. Nothing in this recommendation should be taken to relate to other specific statutory oaths.

CHAPTER 22: A CLASSIFICATION SYSTEM?

80. An internal review should be undertaken of practices associated with the marking of documents with various grades of confidentiality with a view to eradicating practices that might undermine a full and complete implementation of the substance and spirit of our recommendations.

81. Whatever classification scheme, if any, might be adopted, it should be adopted for internal administrative purposes only. Marked documents per se should not constitute an exemption to the legislated freedom of information scheme.

CHAPTER 23: RULE-MAKING PROCEDURES

82. We recommend that governmental institutions engaged in rule-making activity be encouraged to adopt notice and comment procedures so as to facilitate public discussion and informed comment on particular rules proposed for adoption.

83. Consideration should be given to the adoption of provisions requiring notice and comment opportunities in specific statutes which confer rule-making powers on governmental institutions.

CHAPTER 24: SUNSHINE PROPOSALS

84. We recommend the enactment of legislation that would require local government bodies, apart from certain exceptional situations, to conduct their deliberations in meetings which are open to the public.

85. The requirements relating to open meetings should apply not only to local government bodies, such as municipal councils and school boards whose members are directly elected by the public, but also to special purpose bodies at the municipal level that are financed by municipal property taxes. These would include, for example, boards of health, conservation authorities, housing authorities, and utilities commissions.

86. The legislation should provide that meetings may be closed in order to allow discussion of the following matters:

    a. personnel matters where a named employee or potential employee is involved, unless the individual has requested that the matter be discussed in a meeting open to the public;

    b. election of the chairman or head of the body;

    c. election of the executive committee of the body;

    d. contract negotiations with employees;

    e. property acquisitions and sales;

    f. discussions concerning litigation;

    g. any matters that, if discussed by a police commission in public, would be injurious to its function;

h. any matters specifically restricted by other legislation resulting from this Commission's recommendations with respect to privacy protection.

87. These exemptions should be permissive rather than mandatory, thus leaving a discretion to hold open meetings even if the matters to be dealt with would fall within one of the exemptions (with the exception of 86(h) above).

To ensure that open meetings legislation is effective, we further recommend that it include:

88. A requirement of adequate advance notice of the time, place and list of the matters to be discussed at the meeting in order that interested members of the public are able to attend. This requirement should also apply when it is intended to hold a closed meeting, and the reasons for closing the meeting should be set out.

89. A requirement that minutes be kept of the proceedings of all meetings of local bodies and made available to the public on request. In the case of closed meetings, minutes should be made available with deletions, where necessary, to protect specified interests.

90. An express provision that "any person" may enforce the open meetings requirements by applying to the courts to enjoin the improper closing of a meeting.

THE PROTECTION OF INDIVIDUAL PRIVACY

CHAPTER 32: THE PROPOSED LEGISLATION: A GENERAL VIEW

91. The legislation should impose duties on governmental institutions to adopt fair information practices with respect to the collection, storage, use and dissemination of personal information.

92. The privacy protection legislation should apply to the institutions of provincial government and local government bodies in accord with the definitions of such institutions set forth in our freedom of information proposals.

93. The resolution of disputes between data subjects and governmental institutions should be effected through the same appeal mechanisms as we have recommended with respect to the freedom of information scheme; that is to say, aggrieved

citizens should be entitled to seek the intervention of the Director of Fair Information Practices and to exercise rights of appeal to the Fair Information Practices Tribunal.

94. A special-purpose administrative body, the Data Protection Authority, should be established for the purposes of applying statutory standards relating to the management of personal data systems to specific data-handling processes, and of engaging in a broad research and advisory role with respect to privacy protection problems in both public and private sector record-keeping practices.

CHAPTER 33: THE STATUTORY IMPLEMENTATION OF FAIR INFORMATION PRACTICES

A Public Record of Government Personal Data Banks

95. We recommend that governmental institutions be required to publish an annual systems notice with respect to each personal record-keeping system they maintain, and to publish new systems notices when new systems are established or substantial modifications to existing systems are effected.

96. Annual systems notices and new systems notices should be required by statute to contain the following information:

a. the name and location of the data bank;

b. the legal authorization for its establishment;

c. the types of information or data items maintained in the system;

d. the principal uses of the information and the categories of users to whom disclosures from the system are typically made;

e. the categories of individuals for whom records are maintained in the system;

f. the policies and practices applicable to the system with respect to storage, retrievability, access controls, retention and disposal of information maintained in the system;

g. the title, business address, and business telephone number of the official responsible for the operation of the system.

97. Governmental institutions should not be required to include items of information in systems notices which would otherwise be exempt from public access under the proposed freedom of information legislation.

98. An annual compendium of systems notices should be published by the government of Ontario. The index could be modelled on the Index of Federal Information Banks, published by the Treasury Board of Cabinet of the government of Canada pursuant to the provisions of the Canadian Human Rights Act, Part IV.

Collection of Personal Information

99. The Data Protection Authority should have the responsibility to comment, where it deems it appropriate to do so, on the privacy protection implications of proposed legislative schemes or government programs.

100. A statutory duty should be imposed on government departments and agencies to collect only such personal information as is either expressly authorized by statute or necessary to the proper administration of a lawfully authorized administrative activity.

101. The Data Protection Authority should have the power to:

a. make binding determinations as to whether a particular data collection meets the standards suggested in paragraph 100;

b. require a government department or agency to cease a collection practice which violates paragraph 100 and to destroy collections of data gathered in violation of this standard.

102. A government department or agency which is engaged in the collection of personal information should inform the individual from whom the information is requested, in writing, of the following:

a. the legal authority for the collection of the information;

b. the principal purpose or purposes for which the information is intended to be used;

c. whether disclosure is mandatory or voluntary and the consequences of failure to provide the information;

d. such proposed use and dissemination of the information as can be reasonably anticipated;

e. the types of additional information and the sources to be used to verify the information;

f. the name, title and business telephone number of a public official who can answer any questions the individual may have with respect to the data collection;

g. whether the individual or some other person will have access and correction rights with respect to the information.

103. The Data Protection Authority should have the power to determine the extent and manner in which information required in paragraph 102 shall be communicated to the individual from whom the information is requested. It may, in appropriate circumstances, excuse the department or agency from engaging in communication of this kind.

104. To the extent practicable, a department or agency should collect information directly from the data subject when an adverse determination may result.

105. The Data Protection Authority should have the power to excuse a department or agency from compliance with paragraph 104.

Standards for Maintaining the Integrity and Security of Data

106. Record keepers should maintain all records used in making a determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual concerned.

107. The Data Protection Authority should be empowered to make final determinations of the application of the standards set forth in paragraph 106 to specific data-gathering systems.

108. The gathering of intelligence information for law enforcement purposes should constitute the exception to the general standards set out in paragraph 106; provided, however, that

the information is stored in such a way as to signal its unreliability to users.

109. The duty should be imposed to destroy personal data no longer useful for the accomplishment of the objectives for which it was originally collected, unless destruction would potentially deprive the data subject of some benefit resulting from its storage or unless the data is to be stored, on terms or conditions approved by the Data Protection Authority for use as a research resource or for ultimate transfer to the Archives of Ontario as data of historical value.

110. Record keepers should establish appropriate administrative, technical and physical safeguards to ensure the security and confidentiality of records and to protect against any anticipated threats to their security or integrity.

111. The Data Protection Authority should make final determinations of the applications of the standards set forth in paragraph 110 to specific data systems.

Controlling Transfers of Data

112. No disclosure or transfer of identifiable personal data should be made unless the disclosure comes within one of the following exceptional cases:

a. disclosure under the freedom of information provisions;

b. a "routine" use as defined by the PPSC, i.e., a use for a purpose which is:

i. compatible with the purpose for which the information in the record was collected or obtained, and

ii. consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected or obtained, and

iii. where disclosure is made to an officer or employee of the agency who has need for the record in the performance of his duties, access may be granted where it is necessary and proper for the performance of the agency's own mission and functions;

c. disclosure for a "collateral use" as defined by the PPSC, i.e., disclosure pursuant to statutory provisions,

provided that such provisions establish specific criteria for the use or disclosure of such information;

d. disclosure by a law enforcement agency to another law enforcement agency in Canada or to a law enforcement agency in a foreign country, provided that in the latter case the disclosure is made pursuant to a written agreement, a treaty or a legislative authority;

e. disclosure to a person pursuant to his showing of compelling circumstances affecting the health and safety of an individual;

f. in compassionate circumstances, disclosure to facilitate contact with the next of kin, or a friend, of an individual who is injured, ill or deceased;

g. disclosure to a member of the Legislative Assembly who has been authorized by a constituent to make an inquiry on his behalf or, where the constituent is incapacitated, has been authorized by a relative or legal representative of the constituent;

h. to the Provincial Auditor;

i. to the Ombudsman of Ontario;

j. to the Data Protection Authority;

k. to the Director of Fair Information Practices;

l. to the Fair Information Practices Tribunal;

m. to the federal government in order to facilitate the auditing of shared-cost programs;

n. to the Archives of Ontario;

o. to Statistics Canada.

Subject Access and Correction Rights

113. Data subject access and correction rights should be conferred with respect to government records containing personal information, the terms "records" and "personal information" being broadly defined in accord with the definitions set forth in the Canadian Human Rights Act, Part IV.

114. Information contained in the records should be provided to the data subject in a form comprehensible to him.

115. A data subject should be permitted to authorize another individual to obtain access to records containing personal information on his behalf.

116. Where practicable, the information should be communicated in such a manner as to indicate the general terms and conditions under which the information in question is maintained and used.

117. Data subjects should have an opportunity to challenge the accuracy, relevance, timeliness or completeness of the information contained in personal records concerning them and, in the event of unwillingness on the part of the record keeper to alter the record, should be permitted to file a statement of disagreement to be stored with the record in question.

118. Record keepers should assume an obligation to communicate corrections, or the existence and nature of statements of disagreement, to future users of the information and, further, should contact prior users of the information or the sources from which the information was obtained in accordance with any instructions in this regard imposed by the Data Protection Authority.

119. Provisions exempting certain kinds of information from the general rule of subject access should be designed along the following lines:

    a. the exemptions should be permissive rather than mandatory in the sense that even though information may be exempt from access, the institution in question would be permitted to disclose the information if it wished to do so;

    b. where portions of a record are exempt, a reasonable effort should be made to segregate the exempt portions and release the remainder of the record to the data subject;

    c. the exemptions should be designed to exempt particular information types rather than entire data banks or systems of records;

    d. the following exemptions set forth in our freedom of information proposals should be applicable in the context of subject access and correction requests:

1. Cabinet documents;

2. law enforcement;

3. international relations and national defence;

4. information received in confidence from other governments;

5. confidentiality preserved by other statutes;

6. information creating unfair advantage or harm to negotiations;

7. solicitor-client privilege.

e. in addition to the foregoing, exemptions relating to the following should apply to subject access and correction requests:

1. information whose disclosure would constitute an unwarranted invasion of another individual's personal privacy;

2. evaluative or opinion material compiled solely for the purpose of determining suitability, elegibility or qualifications for appointment to public or judicial office or for the awarding of government contracts and other benefits, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to the enactment of this legislation, an implied promise that the identity of the source would be held in confidence;

3. medical information whose disclosure would prejudice the health of the data subject;

4. correctional records whose disclosure could reasonably be expected to (1) seriously disrupt an individual's institutional, parole, or mandatory supervision program; (2) reveal information supplied on a promise of confidentiality, express or implied; or (3) result in physical or other harm to that individual or any other person;

5. research and statistical records.

120. Fees may be charged, unless waived by the record keeper, only for the cost of copying the material in question. No charges should be made with respect to the exercise of the access and correction rights, where the data subject has prevailed in the matter of a requested correction.

121. A time limit of thirty calendar days should be imposed for response to the request for access, and an additional thirty days with respect to requests for corrections. Each period could be extended for a further ten-day period where good cause can be shown for the delay.

122. When a decision is taken by a governmental institution to deny a request for access, notice of this decision should be given to the data subject and should include the following information:

    a. the statute or provision under which access is refused;

    b. the basis for concluding that the information sought is covered by the exempted provision;

    c. the availability of further review and how it can be pursued;

    d. the name and office of the person responsible for the decision.

123. In notifying a data subject of denial of a requested correction of the record, the record keeper should indicate the nature of the individual's right to file a statement of disagreement and the right to appeal the decision.

Research and Statistical Data

124. Controls should be placed on the subsequent use of individually identifiable data which has been collected or prepared by a government department or agency solely for research or statistical purposes.

125. These controls should be premised on the recognition of a general principle of "functional separation": data gathered for research or statistical use should not subsequently be used for administrative purposes without the consent of the data subject, except in the following circumstances:

    a. where disclosure will assist in dealing with a serious threat to the health and safety of an individual;

b. where access is necessary in order to carry out an investigation of confidentiality requirements placed on researchers or government personnel;

c. where access is necessary in order to permit the proper authorities to conduct an audit or an evaluation of research or statistical activities carried out or financed by the government;

d. where identifiable data are transferred to the Archives of Ontario because of their historical value.

126. We commend Professor Flaherty's proposals for the establishment of a provincial statistical bureau to the government of Ontario as worthy of further consideration.

The Duty to Record Disclosures

127. In order to facilitate subject awareness of uses made of personal data, propagation of corrections to other users of the data, and monitoring of compliance with the rules controlling data transfers, it is recommended that:

a. record keepers be required to maintain an accounting of all disclosures or transfers of identifiable personal data;

b. the record subject have access to the accounting of disclosures, apart from disclosures for law enforcement purposes.

CHAPTER 34: ADMINISTRATION AND ENFORCEMENT

128. To ensure that an administrative focal point is established in each institution subject to the scheme, we recommend the appointment of a "responsible keeper" within each institution whose responsibility would be to ensure that data banks subject to his supervision are operated in compliance with the requirements of the data protection law.

129. A Data Protection Authority should be established, which would have a broad mandate to supervise the implementation of the data protection scheme and to engage in research on privacy protection implications of the record-keeping practices of public and private institutions.

130. The Data Protection Authority should be a body established for the specific purpose of implementing the data protection scheme. It should be appointed by the Lieutenant Governor in Council and should report directly to the Premier. The powers and duties of the DPA should be defined by regulations passed by the Lieutenant Governor in Council, and an annual report of its activities should be made to the Premier, who would be obliged to table it in the Legislature or otherwise make it available to the public.

131. For an interim transitional period, it may be appropriate to assign the responsibilities of the DPA to the Management Board of Cabinet.

132. The resolution of disputes between data subjects and governmental institutions maintaining personal data should be handled by the dispute resolution mechanisms established for the purposes of resolving similar disputes under the freedom of information law. Aggrieved individuals should be entitled to seek the intervention of the Director of Fair Information Practices and, on appeal, the Fair Information Practices Tribunal.

133. Apart from his responsibilities with respect to dispute resolution, the director should be empowered to comment more generally on the privacy protection implications of information practices which have become subject to his scrutiny.

134. As in the context of our freedom of information proposals, the Director of Fair Information Practices and the Fair Information Practices Tribunal should be empowered to obtain access to exempt documents and to examine them in camera in the absence of the parties. Proceedings before the director would be informal in nature. Proceedings before the tribunal would be subject to the provisions of The Statutory Powers Procedure Act. The tribunal should be empowered to entertain representations from governmental institutions in the absence of the applicant where this is necessary to facilitate a full explanation of the reasons for non-disclosure of a particular document.

CHAPTER 35: CIVIL AND CRIMINAL LIABILITY

135. A data subject should be entitled to monetary damages for identifiable harm resulting from breaches of the following statutory duties:

    a. the duty to collect only authorized or relevant data;

b. the duty to refrain from disclosure or transfer of data;

c. the duty to give access to files and make corrections;

d. the duty to propagate corrections.

136. The government should be liable for such damages regardless of whether the harmful conduct was intentional, but a public servant should not be subject to personal liability unless he acts in willful disregard of his statutory duty.

137. The privacy protection legislation should embody provisions creating the following offences:

a. improper disclosure of identifiable personal data by a public servant who, knowing that disclosure is prohibited, willfully does so;

b. willful maintenance of a data bank in contravention of the requirement of publication of information about data banks;

c. obtaining or attempting to obtain personal data under false pretences.

CHAPTER 36: REGULATING USE OF THE SOCIAL INSURANCE NUMBER

138. We suggest that legislation could be enacted embodying the following provisions:

a. No provincial governmental institution shall deny to any individual any right, benefit or privilege provided by law because of that individual's refusal to disclose his Social Insurance Number, unless the institution is authorized to require disclosure of the number by federal or provincial law, or by the Data Protection Authority.

b. Any provincial governmental institution which requests that an individual disclose his Social Insurance Number shall inform that individual whether the disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

However, we do not recommend any legislative action until the study of the federal Privacy Commissioner with respect to the use of the SIN and its implications for individual privacy becomes available.

CHAPTER 37: MAILING LISTS

139. Governmental institutions which maintain public records containing the names and addresses of individuals should be encouraged to devise procedures whereby such individuals could indicate on the public record in question that they do not wish to have their names included on mailing lists compiled from those records.

140. Governmental institutions which possess records containing names and addresses of individuals not normally available to the public should be permitted to sell or supply name and address information for mailing list purposes only if the individuals in question have given their consent to the communication of this information for such purposes.

CHAPTER 38: TRANSBORDER DATA FLOWS

141. Transborder storage and transfer of personal data should be the subject of study by the Data Protection Authority with a view to making such recommendations as may be appropriate in the light of privacy protection considerations.

Appendixes

Appendixes

APPENDIX A: LIST OF PUBLIC BRIEFS

	Brief No.
ACCESS (A Canadian Committee for the Right to Public Information), Ottawa	53
Adams, M.J., Toronto	81
Armstrong, J.D., M.D., Toronto	46
Associated Credit Bureaus of Ontario, Toronto	78
Association of Community Information Centres in Ontario, Toronto	35
Association of Municipalities of Ontario, Toronto	90
Atkey, R.G., Toronto	64
Bradshaw, C., Ottawa	56
Brown, C., Conn	5
Brunette, D., Timmins	23
Burrows, T., M.D., Toronto	82
Canadian Association of Special Libraries and Information Services (CASLIS), Toronto Chapter	66
Canadian Civil Liberties Association, Toronto	92
Canadian Civil Liberties, Timmins Chapter	75
Canadian Daily Newspaper Publishers' Association, Toronto	32
Canadian Environmental Law Association, Toronto	44
Canadian Federation of Independent Business, Toronto	3
Canadian Information Processing Society (Toronto Section) Public Service Committee	31
Canadian Manufacturers Association (Ontario Division), Toronto	62
Carleton University, Ottawa	65
Cassidy, M., M.P.P., Toronto	38
Centennial College Journalism Students, Toronto	60
Chatham Daily News (D. Waite)	24
Chemong Lakeside Ratepayers Association	7
Children's Aid Society of Metropolitan Toronto, Staff Association	67
Cloutier, P., Toronto	37
Community Information Service, Kingston	27
Conibear, R., Ottawa	54
Farkas, Professor E.J., Faculty of Environmental Studies, University of Waterloo	25

	Brief No.
Gibson, R.B., Walkerton	21
Grand Council Treaty #9, Timmins	73
Greater Barrie Chamber of Commerce	40
Hamilton & District Chamber of Commerce	79
Hornick, Dr. J.P., Department of Family Studies, University of Guelph	33
Industrial Accident Victims Group of Ontario, Toronto	85
Information London	48
J.F.K. Committee, Hamilton	11
Johnson, D., Hamilton	29
Johnson, K., Dundas	9
Jones, S.A. and R.E., Toronto	4
Kingston Public Library (Cartwright) incorporated into Ontario Library Association Brief	68
Kitchener-Waterloo Record	34
Leeds & Grenville Genealogical Society	10
Lepofsky, D., Toronto	74
London Free Press	47
Michalos, Dr. A.C., Director, Social Indicators Research Program, University of Guelph	12
National Cancer Institute of Canada, Epidemiology Unit, Toronto	1
Niagara Falls Chamber of Commerce	93
Niemi, R., Nipigon	18
Non-Smokers' Rights Association, Toronto	43
Official Opposition in the Ontario Legislature	91
Ontario Confederation of University Faculty Associations (Endorsed by Canadian Association of University Teachers), Toronto	52
Ontario Chamber of Commerce, Toronto	49
Ontario Freedom of Information Citizen's Committee, Toronto	39
Ontario Health Record Association, Toronto	83
Ontario Hospital Association, Toronto	61
Ontario Library Association, Toronto	71
Ontario Medical Association, Toronto	2
Ontario Municipal Retirees Organization, London	17
Ontario New Democratic Caucus, Toronto	42

	Brief No.
Ontario Press Council, Ottawa	22
Ontario Public Interest Research Group (OPIRG), Hamilton	50
OPIRG, Waterloo	45
Pedersen, H., Puslinch	20
Periodical Writers Association of Canada, Toronto	70
Pollution Probe at the University of Toronto	88
Proulx, J., Windsor	16
Queen's University, Ad hoc Committee established by the Principal, Kingston	57
Radio Television News Directors Association of Canada, Toronto	86
Rogers, H.H., Beaverton	77
Rowat, Professor D.C., Department of Political Science, Carleton University, Ottawa	14
Rubin, K., Ottawa	51
Sault Ste. Marie & District Chamber of Commerce	76
The Sault Star	69
Scott, B., Ottawa	55
South Essex Community Council, Leamington	30
Spiritual Press, Toronto	89
Suffling, Professor R., et al., Faculty of Environmental Studies, University of Waterloo	26
Sunshine: The Association for a Right to Information, Toronto	80
Turkstra, H., Toronto	95
Union of Ontario Indians, Toronto	87
Walman, B., Windsor	19
Whig-Standard (M.L. Davies), Kingston	58
Whitehead, T.B.G., Kingston	59
Willis, I.D., Alliston	6
Windsor Chamber of Commerce	72
Winter, J., Ottawa	8
Workmen's Compensation Board (Ontario), Toronto	94
Writers Union of Canada, Toronto	70

Oral presentations were made by the following: D. Batchelor, BOOST (Blind Organization of Ontario with Self-Help Tactics), J. Crispo, W. Haley, A. Kelly, L.R. McLean, R. Nevil.

APPENDIX B: CONSULTANTS AND RESEARCH STAFF

Consultants

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Professor T.G. Ison, Faculty of Law, Queen's University
John Jackson, Department of Political Science, University of Windsor
Professor Kenneth Kernaghan, Department of Political Science, Brock University
Professor I.A. Litvak, Faculty of Administrative Studies, York University
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Wayne Morris
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Susan Rowland
Michael J. Sabia
Mark Sandler
Larry Silani
Judith A. Smith
Gregory G. Turnbull

APPENDIX C: LIST OF RESEARCH PUBLICATIONS

The Freedom of Information Issue: A Political Analysis
Research Publication 1
by Prof. Donald V. Smiley, York University

Freedom of Information and Ministerial Responsibility
Research Publication 2
by Prof. Kenneth Kernaghan, Brock University

Public Access to Government Documents: A Comparative Perspective
Research Publication 3
by Prof. Donald C. Rowat, Carleton University

Information Access and the Workmen's Compensation Board
Research Publication 4
by Prof. Terence Ison, Queen's University

Research and Statistical Uses of Ontario Government Personal Data
Research Publication 5
by Prof. David H. Flaherty, University of Western Ontario

Access to Information: Ontario Government Administrative Operations
Research Publication 6
by Hugh R. Hanson, et al.

Freedom of Information in Local Government in Ontario
Research Publication 7
by Prof. Stanley M. Makuch and John Jackson

Securities Regulation and Freedom of Information
Research Publication 8
by Prof. Mark Q. Connelly, Osgoode Hall Law School

Rule-Making Hearings: A General Statute for Ontario?
Research Publication 9
by Prof. David J. Mullan, Queen's University

Freedom of Information and the Administrative Process
Research Publication 10
by Larry M. Fox

Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law
Research Publication 11
by Timothy G. Brown

Freedom of Information and Individual Privacy: A Selective Bibliography
Research Publication 12
by Laurel Murdoch and Jane Hillard,
with the assistance of Judith Smith

Freedom of Information and the Policy-Making Process in Ontario
Research Publication 13
by John Eichmanis

Information Access and Crown Corporations
Research Publication 14
by Prof. Isaiah A. Litvak

Privacy and Personal Data Protection
Research Publication 15
by Michael Brown, Brenda Billingsley and S. Rebecca Shamai

Access to Information and Policy-Making: A Comparative Study
Research Publication 16
by Heather Mitchell

Public Access to Commercial Information in Government Files
Research Publication 17
by Susan Soloway